STATE OF MICHIGAN

COURT OF APPEALS

CAROL ANN PHILLIPS,

Plaintiff-Not Participating,[1]

v

BRYAN MICHAEL PHILLIPS,

Defendant-Appellee

and

DOUGLAS R. HUTCHINS and DOROTHY HUTCHINS,

Third-Party Plaintiffs/Appellants.

UNPUBLISHED
April 22, 1997

No. 191558
Wayne Circuit Court
LC No. 88-802859

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,* JJ.

PER CURIAM.

This dispute involves custody of the children of plaintiff Carol Ann Phillips, who is now deceased, and defendant Bryan Michael Phillips. Pursuant to the parties' divorce in 1988, sole custody was awarded to plaintiff. Following plaintiff's death in 1995, plaintiff's parents, Douglas and Dorothy Hutchins (third-party plaintiffs in this case, hereinafter referred to as "the grandparents") sought custody of the minor children. The trial court dismissed the grandparents' claim for lack of standing. The grandparents now appeal. We reverse.

On August 12, 1988, the trial court entered a default judgment of divorce, dissolving the marriage between plaintiff and defendant. Pursuant to this judgment, plaintiff was awarded sole legal custody of the couple's two minor children, and defendant was awarded reasonable visitation. Between the time of the divorce and the time of plaintiff's death, the children lived with plaintiff and her parents. Plaintiff passed away on May 23, 1995, and on June 6, 1995, the grandparents filed a motion for temporary and permanent custody of the two children. The grandparents did not contend that

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* Circuit judge, sitting on the Court of Appeals by assignment.

defendant was an unfit parent, but argued that custody with them would be in the best interests of the children because the minors had lived with the grandparents for the majority of their lives.

Defendant moved to dismiss the grandparents' motion, arguing that they lacked standing to contest custody. In granting defendant's motion, the trial court stated, inter alia, the following:

> A third party does not have standing to create a custody dispute not incidental to divorce or separate maintenance proceedings unless the third party is a guardian of the child or has a substantive right of entitlement to custody of the child. * * *
>
> . . . I don't believe there is anything in the language of [MCL 722.21 *et seq*; MSA 25.312(1) *et seq*] that would allow someone to create a custody dispute where none exists.
>
> The mere fact that there was once previously a divorce action and there is nothing incidental to that action in this case leads me to believe that you cannot now create a custody dispute.

Pursuant to this reasoning, the trial court dismissed the grandparents' motion, finding that they lacked standing to contest custody. On appeal, the grandparents argue that the current custody dispute was incidental to the original judgment of divorce/custody, and thus they had standing to seek custody.

In *Bowie v Arder*, 441 Mich 23; 490 NW2d 568 (1992), the Michigan Supreme Court dealt with a somewhat similar situation. In *Bowie*, the parents of the minor child were never married, though the father admitted paternity. *Id.* at 28. Following the child's birth, she lived with her mother and her maternal grandparents, while the father lived elsewhere. *Id.* Before the child's first birthday, the mother died. *Id.* It was not for two years that the father asserted his parental rights. *Id.* Subsequently, the maternal grandparents sued for custody. *Id*. at 29 The trial court found that a third party such as a grandparent "does not have standing to create a custody dispute *not incidental* to divorce or separate maintenance proceedings." *Id*. at 49 (emphasis added).

Pursuant to *Bowie*, we must resolve whether the custody dispute initiated by the grandparents was "incidental" to the 1988 divorce of the parties, in which custody was awarded to the child's mother. However, in *Bowie*, there was no divorce proceeding at all, and no former court adjudication as to custody. Thus, the *Bowie* court did not address or define the phrase "incidental to divorce."

Bowie is distinguishable from the instant case because, in that case, the custody rights of the father had never been taken away – he retained joint custody as an operation of law, and thus received full custody upon the mother's death. In this case, however, pursuant to the judgment of divorce, the father did not have custody at the time of plaintiff's death. Thus, after she passed away, the children were left with no legal custodian. In this situation, Michigan law does not automatically award custody to the surviving parent, but a hearing must be held to determine the best interests of the children. See *Glover v McRipley*, 159 Mich App 130, 144; 406 NW2d 246 (1987). Although there is a statutory presumption that the best interests of the child are served by awarding custody to the surviving parent,

MCL 722.25; MSA 25.312(5), such parent is not entitled to custody by operation of law; there must be an award of custody by the court.

In 1988, the trial court entered a judgment of divorce and an order of custody to plaintiff. In Michigan, "[j]urisdiction over children of divorced parents remains in the court which granted the divorce until the youngest child attains the age of eighteen." *DenHeeten v DenHeeten*, 163 Mich App 85, 88; 413 NW2d 739 (1987). Furthermore, the Michigan Supreme Court has held that "custody may be awarded to grandparents or other third parties according to the best interests of the child in an appropriate case (typically involving divorce.)" *Ruppel v Lesner*, 421 Mich 559, 565-566; 364 NW2d 665 (1984).

In this case, following the death of plaintiff, the trial court's 1988 judgment of custody/divorce, granting sole custody to plaintiff, could no longer be implemented due to impossibility. Although defendant enjoys a presumption that the best interests of the children would be served by granting custody to him, MCL 722.25; MSA 25.312(5), he does not gain custody by operation of law; the trial court must hold a hearing to determine custody. Because the trial court retained jurisdiction of the minor children, *DenHeeten*, *supra*, it had a continuing duty to provide them with a custodial relationship. Thus, following plaintiff's death, the 1988 order of custody needed to be amended to account for the change in circumstances. In regard to the impending amendment of the custody order, the grandparents argued that the best interests of the children would be served if custody was awarded to them. Accordingly, we find that the grandparents' third-party custody dispute in this case was incidental to the 1988 judgment of divorce. Thus, pursuant to *Bowie*, *supra* at 49 and *Ruppel*, *supra* at 565-566, the grandparents had standing to contest custody. The trial court's dismissal of the grandparents' claim is reversed.

We note that we are troubled that the law constrains us to allow this custody battle to continue for such an extended period of time, especially in the absence of any showing that defendant is an unfit father. We believe that the best interests of the children would have been served through a more expeditious and permanent resolution of the custody dispute. We believe the children would be better served if third-parties were more restricted from attempting to revive a custody dispute after such a significant period of time has passed. Accordingly, we urge the State Bar of Michigan's Family Law Section and the Legislature to strive to provide better resolutions to cases such as this.

Reversed and remanded. Appellants being the prevailing parties, they may tax costs pursuant to MCR 7.219.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff

I concur in the majority opinion except for the last full paragraph.

/s/ Richard R. Lamb

[1] Carol Ann Phillips, the custodial parent, passed away on May 23, 1995.